



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KAKAMEGA**  
**CRIMINAL DIVISION**  
**CRIMINAL CASE NO. 16 OF 2010**

**REPUBLIC .....PROSECUTOR**

**VERSUS**

**1. GODFFREY BULIMO MABIALA.....1<sup>ST</sup> ACCUSED**

**2. JOHN OKUMBA OKWARO.....2<sup>ND</sup> ACCUSED**

**3. PATRICK OPANGA MESHACK.....3<sup>RD</sup> ACCUSED**

**4. CALEB MUKUNZI OMUNGAVO.....4<sup>TH</sup> ACCUSED**

**R U L I N G**

**Introduction**

1. The four accused persons first appeared in court on 07.07.2010 when they were remanded in custody pending plea on 27.07.2010. They accordingly took plea on 27.07.2010 before Lenaola J (as he then was). The four were charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code, the particulars being that on the night of 21<sup>st</sup> and 22<sup>nd</sup> June, 2010 at Wamianda village, Musutwi Sub location North East Bunyore Location in Emuhaya District of the Western Province, jointly with others not before court murdered Jane Okochi Robert. They all denied committing the offence. The case was then fixed for hearing on 14.12.2010.

2. When the case came up for further hearing on 11.06.2017, the prosecution was unable to avail witnesses for the case to proceed. The prosecutor applied for time to avail the witnesses but when the matter came up again, later the same day he, informed the court that he wanted to enter a nolle prosequi as per the powers conferred upon him under the provisions of Section 82(1) of the Criminal Procedure Code, Cap 75 Laws of Kenya. That application was opposed and by its reserved ruling dated 19.06.2017, the application to enter a nolle was rejected by the court and the prosecution ordered to proceed with the case. There being no witnesses present in court, the prosecution closed its case whereupon counsel for the defence asked the court to render a ruling on whether or not the 4 accused persons have a case to answer, hence this ruling.

**The Prosecution Case**

3. The first prosecution witness PHILIP M1ABIALA HEMAN, PW1 (Philip) stated that while he was in Nakuru on 22.06.2010, he received a call from one Beatrice Athirwa informing him of the presence of a

woman's dead body in his compound, and further that his house had been broken into and that some blood stains had been found on the floor, on some beddings and on tables.

4. Philip also stated that his informer told him that the first accused herein was not at home though Philip knew that his son was staying at home. On the same day, the first accused arrived in Nakuru where Philip and the first accused's step mother lived. Because of custom, the first accused was not allowed into Philip's house in Nakuru, but at about 6.00pm, the Officer Commanding Station (OCS) at the Bondeni Police Station in Nakuru went to Philip's house and arrested the first accused, on suspicion that he may have had a hand in the death of the woman whose body was found in Philip's rural compound.

5. According to Philip the first accused told him that he (first accused) was shocked by what had happened at the rural home. Later Philip came to discover that the deceased was a relative of his mother from Ebubayi in Bunyore. Thereafter Philip went and recorded his statement at Vihiga Police Station.

6. During cross examination, Philip testified that he took his son, the first accused herein to the police because of mere suspicion. Philip also testified in examination in chief that he knew the rest of the accused persons and that they also knew him.

7. PW2 was Hudson Lubuya Mugunda (Hudson), the Assistant Chief of Hamuyunda Sub-Location in West Maragoli Location of Vihiga County. He stated how on 28.06.2010, in the night, he received a call from someone informing him that a stranger was hiding in his area. In the morning, he and other people went to the home of one Selpher where they found a person hiding under a bed in one of the rooms of Selpher's 4 roomed house. That person was the 4<sup>th</sup> accused, Caleb Mukunzi Omungavo. Hudson called police from Kilingili Police station who came and took away the 4<sup>th</sup> accused person. The 4<sup>th</sup> accused was removed from under the bed at around 10.00am on 28.06.2010.

8. During cross examination, Hudson told the court that the 4<sup>th</sup> accused person was suspected to have taken part in the murder of the deceased in this case. Selpher, also known as Milika was arrested alongside the 4<sup>th</sup> accused.

9. After Hudson testified the prosecution counsel, Mr. Joshua Onyango Jamsumba asked for adjournment and though there was strong opposition to the same, the court allowed it and adjourned the case to 14.12.2016 for further hearing. Prosecution counsel also asked for summons to DCIO Vihiga Division to attend court on 26.10.2016 and explain why he could not avail witnesses.

### **Issue for Determination**

10. After carefully considering the evidence on record the issue that arises for determination is whether the said evidence is sufficient to warrant placing the accused persons on their defence. In other words is the evidence such that if the accused persons say nothing in response, this court would be prepared to convict them?

11. In general terms, a prima facie case is the presentation by the prosecutor of a flexible evidentiary standard that measures the effect of evidence which meets or tends to meet the prosecution's burden of proof on any given issue, which in the instant case is the charge of murder. In the case of **Bhatt – vs – R [1957]E.A 332**, the Court of Appeal for Eastern African, held inter alia, that “a prima facie case is not made out if, at the close of the prosecution, the case is merely one” which on full consideration might possibly be thought sufficient to sustain a conviction.” The court further held that “the question whether there is a case to answer cannot depend only on whether, there is “some evidence irrespective of its credibility on weight, sufficient to put the accused on his defence. A mere scintilla of evidence can never be enough; nor can any amount of worthless discredited evidence.”

### **Determination**

12. Applying the above principles to the instant case, I have reached the conclusion that the prosecution

has not established a prima facie case to warrant placing the accused persons on their defence. The evidence that is on record is based on suspicion as clearly stated by Philip in his testimony. The evidence is also grossly inadequate. The law is clear that evidence based on suspicion is of no probative value against an accused person, no matter how strong the suspicion might be. The evidence by Hudson did not add any value to the prosecution case.

13. What the above analysis boils down to is that the prosecution has not proved that the deceased died, the reason being that no medical evidence was led to that effect. Nor has the prosecution shown what, if at all, the cause of that death was. There is also no indication, even in the smallest of ways, that the accused persons herein were involved in the death of the deceased. The prosecution case is therefore without feet, trunk and head, and it must therefore fail.

### **Conclusion**

14. In the end, I find that the prosecution has not established a prima facie case to warrant placing any of the accused persons on their defence. It may be true that they murdered the deceased, but there is no evidence to support the charge even at this stage of prima facie case.

15. Each of the accused persons is found not guilty of the murder of Jane Okochi Robert and are accordingly acquitted under the provisions of Section 306(1) of the Criminal Procedure Code. Unless they are otherwise lawfully held they shall be released from prisons custody forthwith.

It is so ordered.

Ruling delivered, dated and signed in open court at Kakamega this 20<sup>th</sup> day of September 2017

**RUTH N. SITATI**

**JUDGE**

In the presence of;-

Mr. Juma Ochieng (present).....for the state

Mr. Ondieki (present).....for all 4 accused

Polycap Mukabwa.....Court Assistant